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No. 400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

THE LINEN THREAD COMPANY, LTD.,
Petitioner,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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Reasons for Granting the Writ

Respondent, in his Brief in Opposition, has avoided replying to the most basic reasons for granting the writ set forth in the Petition. (Pet. 9-14.) However, the argument of Respondent contains statements re-

specting the nature and effect of H. R. 7378 (at this date October 19, 1942, reported by the conferees), and of its legislative history (Resp. 5-6) which require this Reply. This is so, because H. R. 7378, the Revenue Act of 1942, and its legislative history provide the recognized grounds for the granting of the Petition herein.

1. The case is of considerable importance to a large number of foreign coporations.

In support thereof, Petitioner called attention to a document, printed by the Committe on Ways and Means of the House, June 5, 1942, and made public June 10, 1942, in connection with Section 162 of H. R 7378. (App. 15, Pet. 9-11.) This public document supports the assertion that *the question involved herein is of general importance.* (Pet. 10.)

Respondent has made no denial of this assertion in his brief, since it is a fact which the Treasury Department represented to Congress. This fact, the general importance of the question, in and of itself, will support the granting of the petition herein.

The argument which Respondent does make respecting this document and other legislative history of H. R. 7378, relates to another question and will be adverted to under "5," *infra.*

2. The decision of the Circuit Court of Appeals, in the matter of weight to be given Departmental Regulations, is in conflict with the decision of this Court in Manhattan Co. v. Commissioner, 297 U. S. 129, *and is therefore in error.*

In the *Manhattan Co.* case, this Court said that regulations are not valid unless reasonable and *consistent* with the statute they purport to interpret.

The statute involved herein provides that "a foreign corporation, engaged in trade or business within the United States, *or having an office or place of business therein,*" shall be taxable as a domestic corporation. (Sec. 231(b).)

Article 231 of Regulations 101 reads, in the part applied by the Court below:

> "The term 'office or place of business,' however, implies a *place for the regular transaction of business* and does not include a place where casual or incidental transactions might be, or are, effected."

The Treasury Regulations thus require that a foreign corporation be engaged in trade or business, in order to be treated like a domestic corporation, giving no real meaning to the term "having an office or place of business," and the Court below so held.

The Congress, considering the language of existing law *for the first time since 1936*, in H. R. 7378, has eliminated the words "having an office or place of business." In recommending that this be done, the Senate Finance Committee, in its Report No. 1631, pp. 50-51, (Oct. 2, 1942) said:

> "Your committee have agreed to the House provision requiring a nonresident alien or a foreign corporation to be engaged in trade or business within the United States in order to be taxable like American citizens or domestic corpora-

> tions with respect to the income derived from sources within the United States. *Under the present law this privilege is extended to* a nonresident alien individual or *a foreign corporation which has an office or place of business in the United States, even though it May not be engaged in business therein.* The provision in the House bill is applicable only with respect to taxable years beginning after December 31, 1941. *With respect to prior taxable years, the provisions of existing law, which afford such treatment to a corporation having an office or place of business in the United States will continue to apply even though such corporation is not engaged in trade or business within the United States.*" (Italics supplied.)

Nothing the Committee might have said could have made clearer that, under the statute involved herein, Petitioner, maintaining an office within the United States, is to be treated as a domestic corporation for 1937 and 1938, even though it was not engaged in trade or business within the United States.

It is obvious therefrom—if not from just reading H. R. 7378 and Section 231 of the Revenue Acts of 1936 and 1938, and giving effective meaning to all of its words—that the Regulations limit the statute, *are inconsistent with it,* and for that reason, that the decision below is in conflict with the decision of this Court in *The Manhattan Co.* Case.

3. A reading of Section 53(b) of the Revenue Acts of 1936 and 1938 requires the conclusion that the Court below erred.

Respondent asserts that Section 53(b) contains nothing at variance with the decision below, as it specifies only the time and place for filing returns.

Section 43(b) specifies three (3) categories of corporations which shall file returns: (1) those engaged in trade or business; (2) those maintaining an office; and (3) those maintaining a place of business.

It is noteworthy that "office or place of business" is not one term. In fact "place of business" precedes "office." They are two categories. It is further to be noted that there is no confusion between (1) having an office and (2) being engaged in trade or business.

The decision below ignores the portent of this section, as does Respondent in his Brief in Opposition, by requiring that a foreign corporation shall be engaged in trade or business, in order to have an office, within the meaning of Section 231(b).

If section 53(b) and section 231(b) be read together, the decision below is obviously wrong.

4. Section 162 of H. R. 7378 and the legislative history thereof conclusively show that the principle of "legislative approval of regulations by subsequent re-enactment of statutory language" is not to be applied in this case.

The Court below held that the re-enactment of the similar language of Section 231 of the Revenue Act of 1936, in 1938 and in the adopting of the Code, constituted legislative approval of the regulations in interpretation thereof.

Petitioner asserted in the Petition to this Court, (supported by the hearings in Congress), that the Committees of Congress considered the language of Section 231 of the Revenue Acts of 1936 and 1938 *for the first time* in H. R. 7378, i. e., during this session of Congress, 1942. When it did so, *Congress changed the very language involved.* Respondent does not deny this fact.

Furthermore, the hearings and Committee reports show that, even in connection with H. R. 7378, the Treasury Department did not bring its regulations to the attention of the Committees of Congress. Respondent can not deny this fact.

Finally, the Senate Finance Committee, in its report (App. 15) said that, under existing law, the statute involved herein, a foreign corporation having an office or place of business within the United States (Petitioner) is to be treated as a domestic corporation, "even though it may not be engaged in business" in the United States.

Section 162 strikes out "having an office or place of business." What does this do? For the *future*, a foreign corporation must be engaged in trade or business within the United States, to be treated like a domestic corporation. Then previously, there must have been at least two categories of foreign corporations entitled to the same rights and privileges as domestic corporations. Yet, the regulations and the decision below in fact limit the statute to one category of foreign corporations—a corporation engaged in trade or business.

In adopting Section 162, the Senate Finance Com-

mittee carefully explained what it was doing, after hearings on the subject.

In these circumstances, and knowing all these facts, to apply the principle that subsequent re-enaction of this statutory language amounts to an approval of the departmental regulations in interpretation thereof is error.

When the facts respecting the proposed change in existing law came to the attention of Counsel for Petitioner, they were immediately called to the attention of the Court below by Petition for Rehearing. (R. 45.)

The petition was denied June 19, 1942, without waiting for the interpretation of the Senate Finance Committee, (October 2, 1942) *after* hearings, and pursuant to which the language quoted at page 4, *supra,* was written. Had the Court below had the Report of the Senate Finance Committee and the action of the House and Senate on the Bill, it is believed it would have changed its opinion accordingly and reversed its decision.

5. Subsequent legislation (H. R. 7378) on the same subject, changing the existing law, in the presence of the legislative interpretation of existing law, clearly shows that the decision below is erroneous and should be reversed.

Under date of June 5, 1942, the Treasury Department called the attention of the Ways and Means Committee of the House to the fact that foreign corporations, holding substantial amounts of stock in domestic corporations (Petitioner), having a nomi-

nal office, but not engaged in trade or business, (Petitioner) "can avoid the treatment afforded foreign corporations" under Section 231(a). This meant that such foreign corporations as Petitioner are to be treated like domestic corporations, under Section 231(b) of the Revenue Acts of 1936 and 1938, as Petitioner contends. It was recommended that the law be changed to limit to foreign corporations engaged in trade or business within the United States the right to be treated like domestic corporations.

Respondent says that the language of the document referred to was not included in the formal printed hearings and says it is informed that the document was not written by the Treasury Department.

The fact remains that it is a public document. It was not included in the printed hearings, because it was printed and published June 5, 1942, *after* the House hearings. Only the Treasury Department and the Counsel to the Joint Committee on Taxation were at that time before the Committee. Only the Treasury Department could have known the facts contained therein, and Treasury made the representations, whether or not its representatives did the manual writing. Respondent's argument in this respect is not frank.

While the statement relied upon by Petitioner is inconsistent with the Regulations, as Respondent insists, the fact is that the Regulations were not called to the attention of Congress. Indeed it is doubtful that the Committees of the House and Senate would have taken the time to change the law, had they been advised that, under the Regulations, it was not neces-

sary to change the law. Under the Regulations, a foreign corporation must be engaged in trade or business within the United States, to file returns in like manner as a domestic corporation. It would have, therefore, been unnecessary to change the law, had not Treasury made the representations contained in the document of June 5, 1942.

The Ways and Means Committee followed the recommendations contained in this document, *without hearings on the subject,* and the House followed the recommendations of its Committee, (H. R. 7378) and eliminated from existing law the words "having an office or place of business."

The Senate Finance Committee held hearings on the House Bill, at which Counsel for Petitioner appeared. (Hearings, pp. 924-929.) Respondent asserts there is no language respecting existing law in the Report of the Senate Finance Committee, although counsel urged such language. That is definitely not correct.

Counsel urged that no change be made in existing law, but in any event, if a change were made, that the Committee make the change prospectively and state in its report what change was being made in existing law. This is precisely what the Senate Finance Committee did.

After a vote of the full Finance Committee, announced by the Chairman to the press, the alternative request was agreed to, and the Committee stated the following in its report to the Senate (No. 1631, pp. 50-51):

> "Your Committee have agreed to the House provision requiring a nonresident alien or a foreign corporation to be engaged in trade or business within the United States in order to be taxable like American citizens or domestic corporations with respect to the income derived from sources within the United States. Under the present law this privilege is extended to a nonresident alien individual or a foreign corporation which has an office or place of business in the United States, even though it may not be engaged in business therein. The provision in the House bill is applicable only with respect to taxable years beginning after December 31, 1941. With respect to prior taxable years, the provisions of existing law, which afford such treatment to a corporation having an office or place of business in the United States will continue to apply even though such corporation is not engaged in trade or business within the United States."

The legislative history shows why the law is being changed and what the change in law means—namely, that being engaged in trade or business within the United States will *henceforth* be required, if a foreign corporation is to be treated like a domestic corporation. The change is being made because under existing law a foreign corporation owning stock of domestic corporations may merely maintain a nominal office and enjoy the same benefits, without being engaged in trade or business, i. e., Petitioner.

Petitioner urges that there is no ambiguity either in the existing law involved herein or in H. R. 7378, if meaning be given all words of existing law, and

that the Court below erred in limiting the statute in like manner as do the Regulations, and in rendering meaningless the words "or having an office or place of business therein, by denying a foreign corporation (Petitioner), having an office within the United States, the right to file federal income tax returns, even though it may not be engaged in trade or business therein.

It is only if the language of the statute is ambiguous or requires interpretation that resort should be had to regulations or to legislative history.

If the language of the statute is considered ambiguous, then certainly—when Congress makes a change in the statute and at the same time interprets existing law, particularly after it has been held that Congress has adopted regulations in conflict with such interpretation—the legislative interpretation of the prior law should be given great weight in determining the meaning of its language.

Great Northern R. Co. v. U. S., (Oct. Term, 1941 Dec. Feb. 2, 1942) 86 L. Ed. 446; *New York P. & N. R. Co. v. Peninsula Produce Exchange,* 240 U. S. 34; *Bowling v. United S.,* 233 U. S. 558; *Marchie Tiger v. Western Investment Co.,* 221 U. S. 286; *Cope v. Cope,* 137 U. S. 682; *Stockdale v. Atlantic Ins. Co.,* 87 U. S. 323; *U. S. v. Freeman,* 3 How. 556.

If this Court gives any weight to the interpretation of the Senate Finance Committee of Section 231(b) of the Revenue Acts of 1936 and 1938, and H. R. 7378, when the Committee knew that foreign corporations such as Petitioner, owning stock in domestic corporations, maintaining an office, but not

engaged in trade or business in the United States, were seeking to be treated as domestic corporations, under the law (Hearings, pp. 924-929) this Court must hold that the decision below was erroneous.

The decision below denies the Petitioner the right Congress sought to give and did give in 1936, (except for the Regulations), and now says it did give prior to H. R. 7378, and is now taking away as to the future only.

6. This case differs to some extent from AKTIEBOLAGET SEPARATOR v. COMMISSIONER, *128 F (2) 739 (cert, den. October 12, 1942); but if they are held not distinguishable, then the denial of the Petition for a Writ of Certiorari therein was wrong for the reasons "1" to "5",* SUPRA; *such denial should not prejudice the granting of the Petition herein, since reasons "1" to "5",* SUPRA, *were not brought to the attention of this Court in that case prior to the denial of the Writ.*

This case and the case of *Aktiebolaget Separator* differ in the following respects:

Petitioner maintained an office in a building different from that of its subsidiary, whereas the "office" of *Aktiebolaget* was in the suite of its subsidiary, which was the "Landlord."

Petitioner's office manager was an expert in the netting field, able to advise and advising the company respecting changes in products affecting the business, such as "nylon" and other such matters, and was not employed by the subsidiary. *Aktiebo-*

laget's representative continued in the primary employ of the subsidiary.

Thus, there might be some question as to whether *Aktiebolaget,* in fact, even maintained what might be termed an "office." There can be no question that Petitioner herein did maintain an office. (R. 26-27, 40-41.)

However, it is not necessary to the granting of the Petition herein that the case of Petitioner and the *Aktiebolaget* case be distinguished, for this Court did not have before it reasons "1" to "5", *supra,* in support of the Petition for the Writ of Certiorari therein.

An examination of the Petition in that case discloses that the Petitioner did not show from H. R. 7378 and its legislative history (1) that the question involved therein is of general importance and (2) that Congress, in enacting H. R. 7378, has interpreted the language of the statute involved to mean the opposite of the meaning given in the decision below and to mean precisely what Petitioner contends herein it does mean, so that the decision below is wrong and should be reversed.

In these circumstances, the denial of the Petition in the *Aktiebolaget* case should not prejudice the granting of the Petition herein.

Whatever may have been the action of the Court in such prior case, if the cases cited at page 11, *supra,* constitute existing law, and if H. R. 7378 and its legislative history, from the inception of Section 162 to date, be given the intended effect, the decision below is wrong and should be corrected by the

granting of the Petition herein and the reversal of the decision of the Circuit Court of Appeals.

There are so many friendly foreign corporations affected by the decision below that maximum consideration of the question involved, by our highest Court, is required.

Conclusion

Since this question is undeniably of general importance, and since the decision below is clearly contrary to the statute involved, as interpreted by Congress, and should be reversed, the Petition should be granted and the decision below reversed.

Respectfully submitted:

Prew Savoy

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October, 1942.